LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
NOV 14 1971
CLERK

October Term, 1971

No. .....

71-641

CONCHITA ESCOBAR,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Superior Court of the State of California for the County of Orange.

MCPHERSON BERRIEN E. MOORE,
KENNETH SCHOLTZ,
1515 Redondo Beach Boulevard,
Gardena, Calif. 90247,
(213) 327-1515,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons Relied on for Allowance of Writ	7
I.	
The Red Light Abatement Act Is an Unconstitutional Prior Restraint Upon the Exercise of Free Speech as Applied Herein	7
II.	
The Order Imposed Against Petitioner Purports to Prohibit the Presentation of Entertainment Protected by the First Amendment and It Is Therefore Overly Broad on Its Face	11
III.	
Conclusion	14

INDEX TO APPENDICES

Appendix A. Pertinent Penal Code Sections Involved ..... App. p. 1

Appendix B. A Stipulation for Entry of Decree of Permanent Injunction; Order Thereon ..... App. p. 6

Appendix C. Declaration of Contempt for Violation of Permanent Injunction ..... App. p. 9

Appendix D. Clerk's Office Supreme Court, Sept. 22, 1971. Hearing Denied ..... App. p. 18

TABLE OF AUTHORITIES CITED

Cases	Page
Bantam Books, Inc. v. Sullivan, 372 U.S. 58	12
Berry, In re, 68 Cal. 2d 137, 65 Cal. Rptr. 273	12
Board of Supervisors v. Simpson, 36 Cal.2d 671, 227 P.2d 14	8
Central Magazine Sales Limited v. United States, 389 U.S. 50. (1967)	14
Dombrowski v. Pfister, 380 U.S. 486	11, 12
Giannini, In re, 69 Cal.2d 563	9; 13
NAACP v. Button, 371 U.S. 415	12
Near v. Minnesota, 283 U.S. 697	9, 10
Perrine v. Municipal Court, ... Cal.3d .... 97 Cal. Rptr. 320	10
Thornhill v. Alabama, 310 U.S. 88	12
United States v. Central Magazine Sales Limited, 381 F.2d 821	14
United States v. One Carton Positive Motion Picture Film, 367 F.2d 889	14
United States v. Thirty-five Millimeter Motion Picture Film, 432 F.2d 705, Cert. granted 91 Sup. Ct. 881	14
Zwickler v. Koota, 389 U.S. 241	11
Statutes	
California Code of Civil Procedure, Sec. 1222	1
California Penal Code, Sec. 311.6	10
California Penal Code, Sec. 11225	7
California Penal Code, Secs. 11225-11235	2, 7
California Penal Code, Sec. 11230	3, 7, 8, 9
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, First Amendment	2, 8, 9, 11, 13, 14
United States Constitution, Fourteenth Amendment	9

IN THE

Supreme Court of the United States

October Term, 1971
No. .....

CONCHITA ESCOBAR,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Superior Court of the State of California for the County of Orange.

Petitioner, Conchita Escobar, respectfully prays that a Writ of Certiorari be issued to review the final judgment of the Superior Court of the State of California for the County of Orange entered in the above matter on June 15, 1971.

Opinions Below.

There were no written opinions below.

Jurisdiction.

On June 15, 1971, in the Superior Court of the State of California for the County of Orange, petitioner was found to be guilty of a contempt of court for having violated the terms of a permanent injunction. An order holding a person in contempt of court is not appealable. California Code of Civil Procedure §1222. On September 29, 1971, the time for filing this peti-

tion was extended to and including November 12, 1971. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Are Sections 11225 through 11235 of the California Penal Code, commonly known as the Red Light Abatement Act, constitutionally vague and overbroad and do they constitute a prior restraint on the exercise of free speech in violation of the First Amendment insofar as said sections purport to authorize the closing for one year of a place of entertainment.

2. Is the permanent injunction which petitioner was found to have violated unconstitutionally vague and broad in violation of the First Amendment and is said permanent injunction an unlawful prior restraint upon the exercise of free speech in violation of the First Amendment in that it purports to prevent petitioner from presenting non-obscene entertainment.

Statutory Provisions Involved.

Sections 11225 through 11235 of the California Penal Code, commonly known as the Red Light Abatement Act, are set forth in their entirety in Appendix "A".

Statement of the Case.

Petitioner, Conchita Escobar is, and since June 21, 1968 has been, the owner and operator of a bar and place of entertainment known as the "Vampire Room", located in Santa Ana, California.

On or about May 2, 1969, a complaint was filed in the Superior Court of the State of California, in and for the County of Orange, entitled *People of the State of California, Ex Rel. Cecil Hicks, District Attorney*

of Orange County v. The Vampire Room, Conchita Escobar, et al. Said complaint was filed pursuant to and under the authority of the Red Light Abatement Act and alleged that the Vampire Room was being used for the maintenance of a nuisance contrary to Section 11230 of the Penal Code and that the premises had the general reputation of being a place which was kept, conducted and maintained for the purpose of lewdness and assignation. As part of the relief prayed for in said complaint, the court was requested to issue an order directing the Sheriff of Orange County to remove from the Vampire Room all furniture, fixtures, musical instruments or movable property of whatever kind or nature used in conducting or maintaining the nuisance and directing the Sheriff to sell the same in the manner provided for the sale of chattels under execution. Said complaint further prayed for an order directing the Sheriff to close the building to any use or purpose for one year.

On or about May 14, 1969, the Superior Court issued a preliminary injunction against petitioner. On or about May 29, 1969, petitioner filed her answer to the complaint.

On or about June 27, 1969, petitioner entered into a stipulation with the District Attorney whereby the temporary injunction would become permanent. In turn, the District Attorney would not seek to close the premises (and thereby cause petitioner's personal property in the bar to be sold). The order (constituting the permanent injunction) filed pursuant to said stipulation reads:

"IT IS HEREBY ORDERED that Conchita Escobar, as well as all other managers and op-

erators of the defendant establishment, are permanently enjoined and restrained from conducting or permitted (sic) to be conducted herein as part of the business operations the so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia, anus and pubic hair region whether real or simulated, are not completely covered by material which cannot be seen through by the nearest spectator.

"IT IS FURTHER ORDERED that all managers and operators of the above establishment are enjoined and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity." (Appendix B).

On or about December 18, 1970, a declaration of contempt for violation of permanent injunction was filed against petitioner by the District Attorney of the County of Orange (Appendix C). Said declaration specified, in pertinent part:

"On December 7, 1970 and December 8, 1970, adult females performed and exhibited themselves on a raised platform at the VAMPIRE ROOM and during each of said performances and exhibitions they displayed their genitalia, and pubic hair region, and on the December 8, 1970, occurence the anal region was also clearly displayed, and on both occasions the above described areas were fully visible and viewed by the patrons

seated in the establishment, all as more fully visible and viewed by the persons seated in the establishment, . . ."

On or about December 18, 1970, an order to show cause was filed ordering petitioner to appear and show why she should not be punished for contempt. A contempt hearing was held in the Superior Court of the State of California for the County of Orange on May 10, 11 and June 15, 1971. Testimony was taken and petitioner was represented by counsel. Petitioner was found in contempt on one count (events of December 7, 1970) and not guilty of contempt as to the December 8, 1970 incident. Petitioner was sentenced to be confined for ten days in the Orange County Jail. Said imprisonment was stayed so that petitioner might seek judicial review. Petitioner is due to report to the Orange County Jail on January 5, 1972, to serve said sentence.

On or about August 5, 1971, petitioner filed a petition for writ of habeas corpus or certiorari in the Court of Appeal of the Fourth Appellate District, State of California. On or about August 17, 1971, said petition was denied without opinion. A true and correct copy of said denial is attached hereto as Appendix D.

On or about August 23, 1971, petitioner filed a petition for writ of habeas corpus or hearing in the Supreme Court of the State of California. On or about September 22, 1971, said petition was denied without opinion. A copy of the order denying said hearing is attached hereto as Appendix E.

The contempt hearing evidence established that the Vampire Room is a bar where female entertainers danced while bare breasted upon a runway and stage. The dancers did not perform in the nude in compliance with the Red Light Abatement Act order dated June 27, 1969 (Appendix B). On December 7, 1970, two police officers from the City of Santa Ana entered the Vampire Room. As they entered they observed Monette McCall dancing on the runway stage which extended from the bar counter. Miss McCall was lying on the runway and, although she was wearing a G-string it was displaced so that her "pubic area" was visible. The police officer took a seat near the runway and observed McCall knead her breasts with her hands. Then McCall laid back and spread her legs. She reached with her hands and pulled her vulva open. Music was playing and MeCall was moving her body, but it did not appear that such motions were in time with the music. McCall moved down the runway and appeared to repeat like acts before various customers.

After standing up and dancing to one record, McCall was observed to bend over and, spread her buttocks and push the strap of the G-string into her "anal aperture". McCall was placed under arrest at the conclusion of the performance.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The Red Light Abatement Act Is an Unconstitutional Prior Restraint Upon the Exercise of Free Speech as Applied Herein.

The proceedings against petitioner herein are based upon the California Red Light Abatement Act which is set forth in Sections 11225 through 11235 of the California Penal Code. Section 11225 provides as follows:

> "Every building or place used for the purpose of . . . lewdness, assignation or prostitution, and every building or place in or upon which . . . lewdness, assignation, or prostitution are held or occur, is a nuisance which shall be enjoined, evaded and prevented, whether it is a public or private nuisance.

The manner in which the abatement is to be carried out is specified in Section 11230 of the Penal Code as follows:

> "If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures, musical instruments and moveable property used in conducting, maintaining, aiding or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution, and the

effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released. While such order remains in effect as to closing such building or place it is and shall remain in the custody of the court . . ."

The Red Light Abatement Act was originally enacted in 1913 and was made a part of the Penal Code in 1953. It was originally intended to be used for the control of houses of prostitution. *Board of Supervisors v. Simpson*, 36 Cal.2d 671, 227 P.2d 14 (1951). In recent years the Act has been used against places where nude dancing is presented on the theory that such daneing constitutes acts of lewdness. As of this date, petitioner is aware of no appellate decisions in the State of California either approving or disapproving the use of the Red Light Abatement Act against such conduct. Similarly, there are no reported opinions in the State of California discussing the legality of applying the Act to stop nude dancing (and close the forum of such performances) which is entertainment *prima facie* protected by the First Amendment.

In the instant case, the order closing the premises and selling the chattels (Section 11230 of the Penal Code) was prayed for in the complaint. The District Attorney did agree to waive the requested closure as part of the compromise by which the temporary injunction became permanent. Said Section 11230 authority to close the premises, *et cetera* is a viable issue here, since petitioner stipulated to the permanent injunction in order to avoid the risk that her business would be closed for one year and her personal property sold.

An order such as that provided for by Section 11230 of the Penal Code and of the type entered against petitioner amounts to unconstitutional prior restraints where, as here, the alleged acts of lewdness involve the performances of dances by entertainers before a consenting adult audience in places of public amusement. Such dancing is entitled to *prima facie* protection to the First Amendment and may not be prohibited by law unless it is obscene. *In re Giannini*, 69 Cal.2d 563 (1968) Cert. Denied. The order authorized by Section 11230 of the Penal Code would permit a forced closure of petitioner's place of business if such entertainment were presented, notwithstanding that the dominant theme or even majority of the actions are not lewd or obscene. A Section 11230 order may sweepingly and arbitrarily prevent petitioner (or indeed anyone) from presenting even the most innocent entertainment at the Vampire Room for as long as the year.

Even a narrow and specific injunction against obscene or lewd entertainment would be an unconstitutional prior restraint, for it is well established that the exercise of free speech may not be enjoined or abated as a public nuisance, notwithstanding that such speech might, after the fact, be found to be outside the protection of the First Amendment. The leading case is *Near v. Minnesota*, 283 U.S. 697 which involved a statute providing for the abatement of "malicious, scandalous and defamatory" newspapers, magazines, or other periodicals as a "public nuisance". This court held in *Near* that the statute was unconstitutional as an infringement of the liberty of press guaranteed by the First and Fourteenth Amendments and set aside an order enjoying the publication of a magazine

which had been found to contain libelous statements. Thus, even though the persons publishing the libel could have been held responsible therefor after publication, the *Near* court held that such publication could not be enjoined in advance. The recent decision of this court permitting the publication of the Pentagon Papers affirms the viability of *Near*.

In a decision entered only three weeks prior to the denial of a writ to petitioner herein, the California Supreme Court recognized the viability of the doctrine of prior restraint as applied to the area of obscenity. In *Perrine v. Municipal Court*, ... Cal.3d .... 97 Cal. Rptr. 320 (September 3, 1971), the court held unconstitutional a Los Angeles County ordinance providing for the licensing of bookstores. In reaching its decision the court said a license to operate a bookstore could not be denied upon the grounds that the applicant had been convicted of selling obscene books. The court held in *Perrine* that it could not assume that a person once convicted of an obscenity offense would commit another or that, if he did, criminal sanctions would not afford adequate remedy, citing *Near v. Minnesota*. *Perrine v. Municipal Court, supra*, 97 Cal. Rptr. at page 325. Unfortunately, the California Supreme Court did not see fit to apply its *Perrine* reasoning to the instant case. It appears clear that the Red Light Abatement Act as applied herein is nothing more than another example of the unconstitutional inference that a person who has permitted obscene entertainment will do so again and that criminal sanctions (*e.g.*, California Penal Code §311.6) are not an adequate remedy.

II.

The Order Imposed Against Petitioner Purports to Prohibit the Presentation of Entertainment Protected by the First Amendment and It Is Therefore Overly Broad on Its Face.

The doctrine of constitutional overbreath was succinctly stated by this court in *Zwickler v. Koota,* 389 U.S. 241 (1967), which held unconstitutional a New York statute prohibiting distribution of anonymous political handbills of pamphlets. The court there observed that a statute would be unconstitutionally overbroad if, no matter how clear or precise its terminology, it swept unnecessarily broadly and purported to invade the areas of protected freedoms. The existence of an overly broad statute or order is of itself an inhibition of the exercise of First Amendment rights, even though potential enforcement of such order against free speech could be successfully defended on constitutional grounds. As was said in *Dombrowski v. Pfister:*

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See e.g., *Smith v. California,* 361 U.S. 147. When the statutes also have an over broad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical, for in such cases the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v. Bullitt,* supra, 377 U.S. at 379. For 'the

threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .'" *Dombrowski v. Pfister, supra,* 380 U.S. at page 486.

The rule of unconstitutional overbreath is not limited to penal statutes and it has been held to apply to injunctive orders. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1962), *Thornhill v. Alabama,* 310 U.S. 88 (1940). See also *In re Berry,* 68 Cal. 2d 137, 65 Cal. Rtpr. 273 (1968).

The general rule is that government regulations which touch upon the exercise of free speech must be stated with narrow specificity calculated to prevent repression of expressive activities which are protected by the Constitution. *NAACP v. Button,* 371 U.S. 415 (1963).

The order in this case is directly concerned with regulating the content of dancing at the Vampire Room. Said order provided as follows:

> "IT IS HEREBY ORDERED that CONCHITA ESCOBAR as well as all other managers and operators of the defendant establishment, are permanently enjoyed and restrained from conducting or permitted (sic) to be conducted therein as a part of the business operations the so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia, anus and pubic hair region whether real or simulated, are not completely covered by material which cannot be seen through by the nearest spectator.

"IT IS FURTHER ORDERED that all managers and operators of the above establishment are enjoyed and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with performers pubic area or breasts in real or simulated sexual activity."

It is unquestioned from the record herein that the finding of contempt against petitioner was based entirely upon the first paragraph of the injunction to wit, a bottomless performance in which the performer's genitalia, anus or pubic hair were not completely covered by an opaque material. Although the performer, Monnette McCall, did make physical contact with her own breasts and pubic area, the injunctive order only prevents such contact when it is between the performer and other persons.

It is now generally accepted that the performance of dancing and other entertainment is protected by the First Amendment even though it may take place in a bar. *In re Giannini,* 69 Cal.2d 563 (1968). Therefore, such entertainment and dancing is not illegal as a result of its sexual content unless it is obscene. However, the order imposed upon petitioner is neither expressly nor impliedly confined to preventing obscene entertainment. It simply prevents the exposure of a performer's genitalia or anus during the course of a performance, whether or not such performance is obscene. A long line of cases has held that in the context of expression protected by the First Amendment neither nudity nor the prominent display of the sexual organ nor the depiction of sexual act is sufficient in and of itself to render such expression obscene unless all the elements of the constitutional tests of obscenity have been met.

Central Magazine Sales Limited v. United States, 389 U.S. 50 (1967) (reversing a finding of obscenity with respect to magazines containing photographs of young women in long stockings and garter belts which framed the pubic area and focused attention on it;) *United States v. Central Magazine Sales Limited*, 381 F.2d 821 (4th Cir. 1967); *United States v. Thirty-five Millimeter Motion Picture Film*, 432 F.2d 705 (2nd Cir. 1970), Cert. granted 91 Sup. Ct. 881; *United States v. One Carton Positive Motion Picture Film*, 367 F.2d 889 (2nd Cir. 1966).

Therefore, the injunctive order is unconstitutionally overbroad in that it expressly prohibits peitioner from presenting entertainment by nude performers even when such entertainment is not obscene. Since the order is not limited to the obscene it is a prior restraint upon the presentation of entertainment protected by the First Amendment.

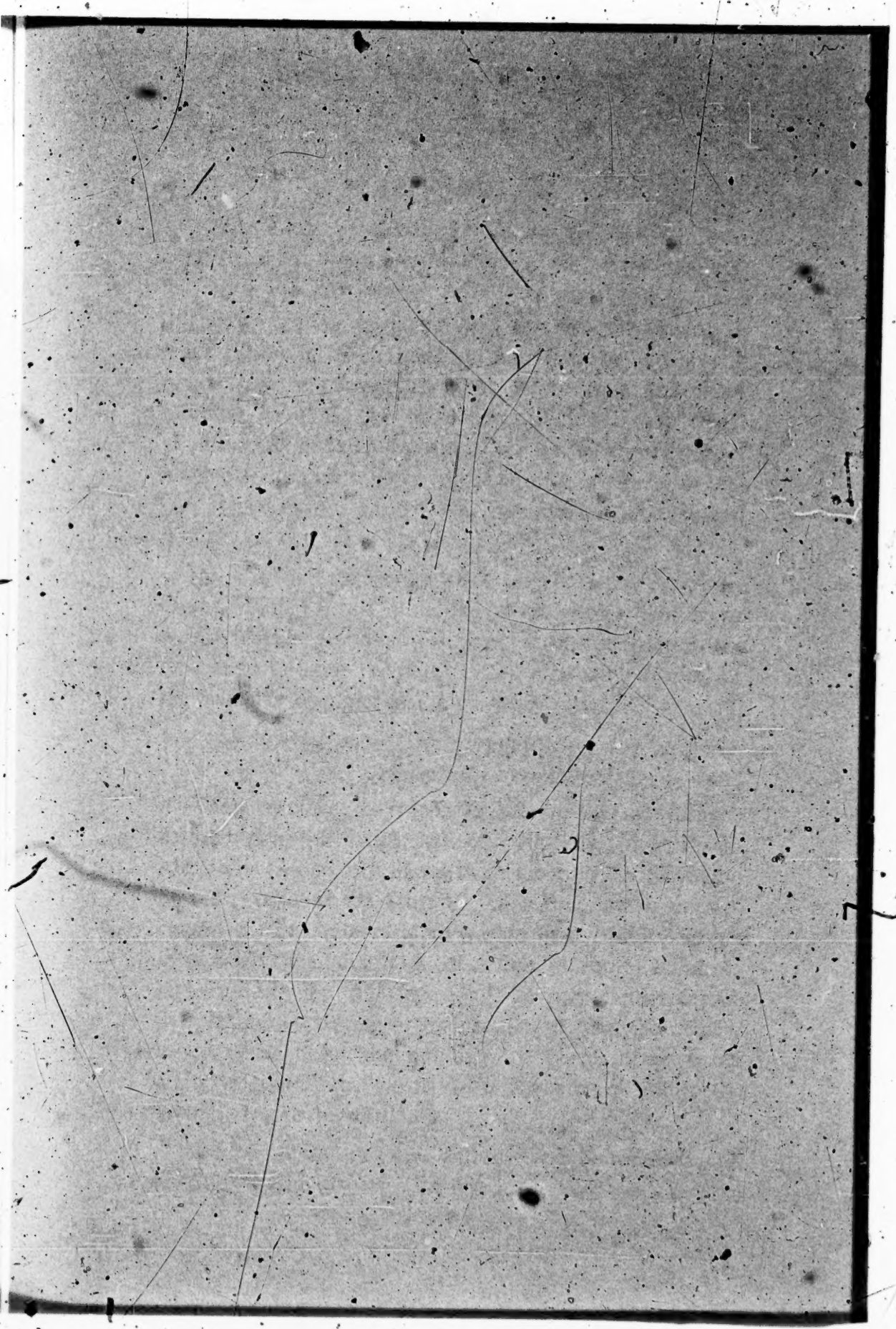
III.

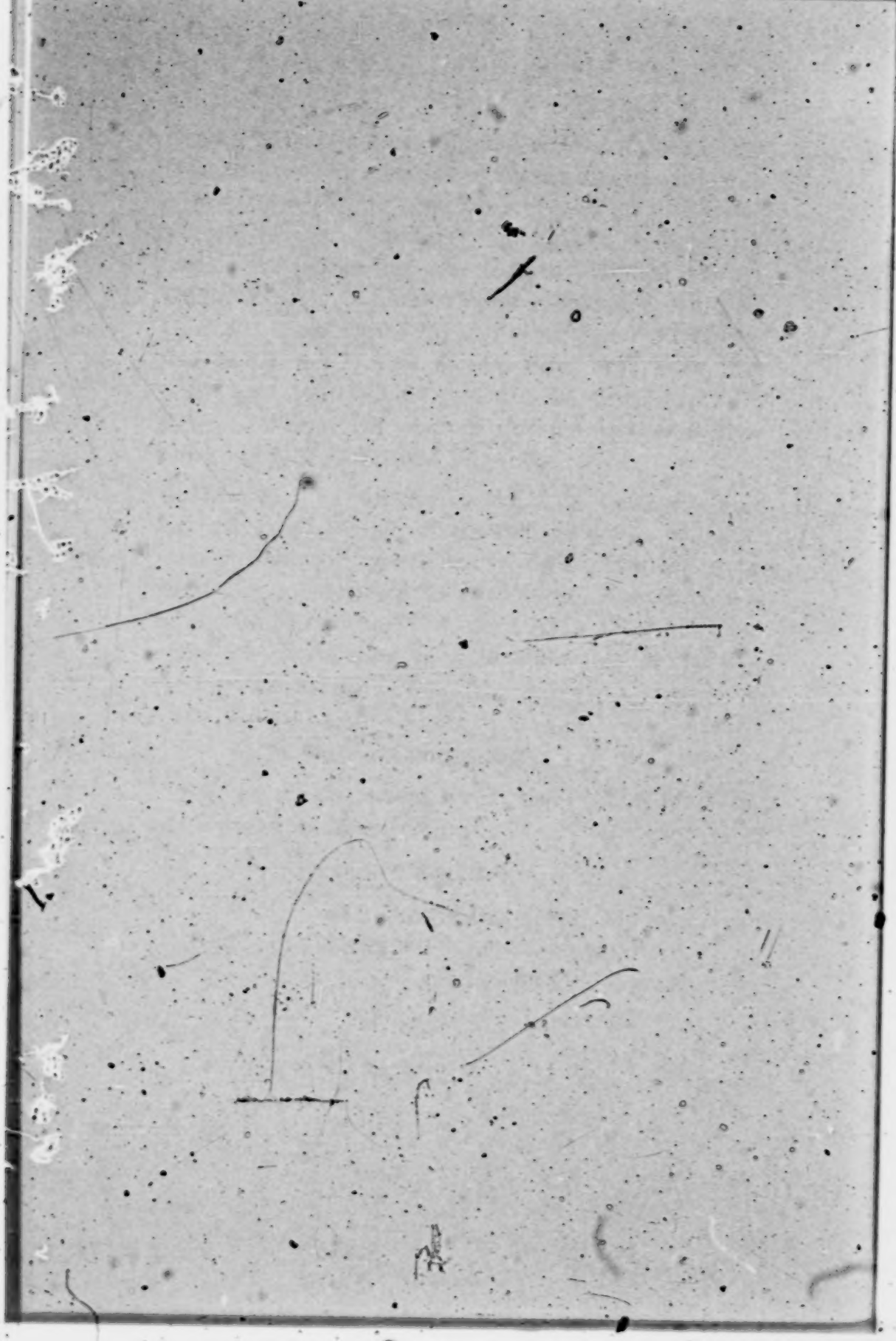
Conclusion.

For the reasons stated herein the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

McPherson Berrien E. Moore,
Kenneth Scholtz,
Attorneys for Petitioner.





APPENDIX A.

§11225. *Place of illegal gambling, prostitution, etc., nuisance; injunction, abatement and prevention*

Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance.

Nothing in this section shall be construed to apply the definition of a nuisance to a private residence where illegal gambling is conducted on an intermittent basis and without the purpose of producing profit for the owner or occupier of the premises.

§11226. *Abatement action; plaintiff; relief demanded; verification of complaint*

Whenever there is reason to believe that a nuisance as defined in this article is kept, maintained or is in existence in any county, the district attorney, in the name of the people of the State of California, must, or any citizen of the State resident within said county, in his own name may, maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee or agent of the building, or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it.

The complaint in such action must be verified unless filed by the district attorney.

§11227. *Temporary injunction*

Whenever the existence of a nuisance is shown in an action brought under this article to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance.

§11228. *Priority of actions; failure to prosecute; substitution of plaintiff; costs*

Actions brought under this article have precedence over all actions, excepting criminal proceedings, election contests and hearings on injunctions, and in such actions evidence of the general reputation of a place is admissible for the purpose of proving the existence of a nuisance. If the complaint is filed by a citizen, it shall not be dismissed by the plaintiff or for want of prosecution except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal ordered by the court. In case of failure to prosecute any such action with reasonable diligence, or at the request of the plaintiff, the court, in its discretion, may substitute any other citizen consenting thereto for the plaintiff. If the action is brought by a citizen and the court finds there was no reasonable ground or cause therefor, the costs shall be taxed against such citizen.

§11229. *Disobedience of injunction; contempt; punishment*

Any violation or disobedience of an injunction or order expressly provided for by this article is punishable as a contempt of court by a fine of not less than two hundred dollars ($200) nor more than one thousand

dollars ($1,000), by imprisonment in the county jail for not less than one nor more than six months, or by both.

§11230. *Order of abatement; removal and sale of personal property; building in custody of court*

If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released. While such order remains in effect as to closing, such building or place is and shall remain in the custody of the court. For removing and selling the movable property, the officer is entitled to charge and receive the same fees as he would for levying upon and selling like property on execution. For closing the premises and keeping them closed, a reasonable sum shall be allowed by the court.

§11231. *Proceeds of sale of property.*

The proceeds of the sale of the property, as provided in Section 11230, shall be applied as follows:

1. To the fees and costs of removal and sale;

2. To the allowances and costs of closing and keeping closed the building or place;

3. To the payment of plaintiff's costs in the action;

4. The balance, if any, shall be paid to the owner of the property so sold.

If the proceeds of the sale do not fully discharge all such costs, fees and allowances, the building and place shall also be sold under execution issued upon the order of the court or judge and the proceeds of such sale applied in like manner.

§11232. *Release of building; conditions*

If the owner of the building or place is not guilty of any contempt of court in the proceedings, and appears and pays all costs, fees and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court, with sureties, to be approved by the court or judge, conditioned that he will immediately abate any nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied of his good faith, order the premises closed under the order of abatement, to be delivered to said owner, and the order of abatement canceled so far as the same may relate to said property. The release of the property under the provisions of this section does not release it from any judgment, lien, penalty or liability to which it may be subject by law.

§11233. *Contempt; fine a lien on building*

Whenever the owner of a building or place upon which an act or acts constituting a contempt as defined in this article has been committed, is guilty of a contempt of court and fined therefor under this article, the fine shall be a lien upon the building and place

to the extent of the interest of such person therein, enforceable and collectible by execution issued by the order of the court.

§11234. *Person*

"Person" as used in this article means individuals, corporations, associations, partnerships, trustees, lessees, agents and assignees.

§11235. *Building*

"Building" as used in this article means so much of any building or structure of any kind as is or may be entered through the same outside entrance.

APPENDIX B.

A Stipulation for Entry of Decree of Permanent Injunction; Order Thereon.

Superior Court of the State of California for the County of Orange.

The People of the State of California, Plaintiff, vs. Vampire Room, Conchita Escobar, et al., Defendants. No. 166 675.

Filed: June 30, 1969.

IT IS HEREBY STIPULATED AND AGREED by and between the people of the State of California, plaintiff, in the above entitled action, and by CONCHITA ESCOBAR, dba THE VAMPIRE ROOM, defendant in the above entitled action, by and through their respective attorneys, that the people of the State of California shall be awarded a permanent injunction to abate the nuisance described in the complaint on file herein.

IT IS FURTHER STIPULATED AND AGREED between the above named parties that an Order may be entered against CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, enjoining and restraining them from conducting or permitted to be conducted within said establishment as a part of the business operations so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia and anus and pubic hair region, whether real or simulated, are not completely covered by a material which cannot be seen through by the nearest spectator.

IT IS FURTHER STIPULATED AND AGREED that all managers and operators of the above establishment are enjoyed and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity.

IT IS FURTHER STIPULATED AND AGREED that except as hereinabove stipulated all other relief prayed for by the complaint is hereby dismissed by the plaintiff.

DATED: June 27, 1969

/s/ Michael R. Cappizi, Deputy
CECIL HICKS, District Attorney of the County of Orange, State of California.
Attorney for Plaintiff

APPROVED:

/s/ Conchita Escobar
CONCHITA ESCOBAR

/s/ Kent G. Snyder
KENT G. SNYDER, Attorney for Defendant, Conchita Escobar, dba The Vampire Room

ORDER

GOOD CAUSE APPEARING THEREFORE:

IT IS HEREBY ORDERED that CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, are permanently enjoined and restrained from conducting or permitted to be conducted therein as a part of the business operations the so-called bottomless performances, which.

more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia, anus and pubic hair region, whether real or simulated, are not completely covered by material which cannot be seen through by the nearest spectator.

IT IS FURTHER ORDERED that all managers and operators of the above establishment are enjoyed and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity.

DATED: June 27, 1969

/s/ Claude M. Owens
JUDGE OF THE SUPERIOR COURT

APPENDIX C.

Declaration of Contempt for Violation of Permanent Injunction.

In the Superior Court of the State of California in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vampire Room, Conchita Escobar, et al., Defendants. No. 166675.

The People of the State of California, Plaintiff in the above entitled action, state:

The above entitled action was brought by the People of the State of California against the above-named defendants under Penal Code Sections 11225-11230, otherwise known as the Red Light Abatement Act. The Case was resolved by a Stipulation between both parties for entry of a decree of permanent injunction. CONCHITA ESCOBAR was a defendant in the above entitled action and was a party to the stipulated permanent injunction. CONCHITA ESCOBAR was and is presently the sole and exclusive licensee for the VAMPIRE ROOM. The Affidavit of M. E. Papke, Special Investigator for the Alcoholic Beverage Control, State of California, which is incorporated by reference and made part of this declaration as though fully set forth herein shows that as of this present date CONCHITA ESCOBAR is still the sole licensee for the VAMPIRE ROOM.

On June 27, 1969 after a stipulation was agreed to and signed by the parties to this action, which specifically included CONCHITA ESCOBAR, an order granting a permanent injunction was made by the HONORABLE CLAUDE M. OWENS, a Judge of the above-entitled court, which order, among other things,

enjoined Defendant CONCHITA ESCOBAR from allowing so-called "bottomless" performances, to-wit:

> It is hereby ordered that CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, are permanently enjoined and restrained from conducting or permitted to be conducted therein as part of the business operations the so-called bottomless performances, which more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia, anus and pubic hair region, whether real or simulated, are not completely covered by material which cannot be seen through by the nearest spectator.

Defendant CONCHITA ESCOBAR was personally served with and had knowledge of the above-described June 27, 1966, order of permanent injunction.

As shown by the affidavit of M. E. Papke which is incorporated by reference, defendant CONCHITA ESCOBAR was the licensee of the business located at 4526 W. Westminister, Santa Ana and known as the VAMPIRE ROOM at all time relevant herein and more specifically on December 7, 1970 and December 8, 1970 had the ability to comply with the above described order of June 27, 1969.

On December 7, 1970 and December 8, 1970, adult females performed and exhibited themselves on a raised platform at the VAMPIRE ROOM and during each of said performances and exhibitions they displayed their genitalia, and pubic hair region, and on the December 8, 1970 occurrence the anal region was also clearly displayed, and on both occasions the above described areas were fully visible and viewed by the patrons

seated in the establishment, all as more fully described in the affidavits of N. Williams, M. Mitchell, James Davis and Greg Cooper, which are attached hereto, incorporated herein by reference and made a part of this declaration.

Subsequent to the granting of the above-described June 27, 1970 order for permanent injunction and after notice of said order, the Defendant CONCHITA ESCOBAR, the Defendant has, with full knowledge, willfully and deliberately failed to comply with said order of the court by permitting and authorizing the conduct above-described and more fully set forth in the attached affidavits of N. Williams, et al., to the place on the premises of the VAMPIRE ROOM on the dates of December 7, 1970 and December 8, 1970.

WHEREFORE, affiant prays for an order requiring that Defendant CONCHITA ESCOBAR, at a time to be named, to appear before this court and show cause, if any he have, why he should not be found guilty of contempt of the permanent injunction order set for above and punished accordingly.

DATED: December 18, 1970.

Respectfully submitted,

CECIL HICKS, DISTRICT
ATTORNEY COUNTY OF ORANGE.
STATE OF CALIFORNIA

By /s/ George W. McClure, Jr.
GEORGE W. McCLURE, JR.
Deputy District Attorney

AFFIDAVIT OF M. E. PAPKE

State of California, County of Orange, No. 16675.

M. E. PAPKE declares that he is presently employed as Supervising Special Investigator for the Alcoholic Beverage Control Board and presently works at the Santa Ana Office.

Affiant states that on December 17, 1970, he checked the records of the State of California and from a review of said records, has personal knowledge that Conchita Escobar as of that date is the only person whose name appears on the license for the sale of alcoholic beverages at 4526 Westminster, Santa Ana, California. That this is the only alcoholic beverage license for the retail sale of alcoholic beverages for this premises, and that it was issued June 21, 1968, to Conchita Escobar as on Sale beer license No. 48-87380.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 1970, in Santa Ana, California.

s/ M. E. Papke
M. E. PAPKE
Supervising Special Investigator

AFFIDAVIT OF N. WILLIAMS

State of California, County of Orange No. 166675

N. WILLIAMS declares that he is presently employed as an officer of the Santa Ana Police Department and incorporates by reference as though fully set forth herein as part of this affidavit, the attached arrest and crime report consisting of 2 pages, and declares under penalty of perjury that the facts and events therein contained were true and correct and were witnessed by him during the course of his above mentioned employment.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on Dec. 18, 1970, in Santa Ana, California.

/s/ N. E. Williams

AFFIDAVIT OF M. MITCHELL

State of California, County of Orange No. 166675

M. MITCHELL declares that he is presently employed as an officer of the Santa Ana Police Department and incorporates by reference as though fully set forth herein as part of this affidavit, the attached arrest and crime report consisting of 3 pages, and declares under penalty of perjury that the facts and events therein contained were true and correct and were witnessed

by him during the course of his above-mentioned employment.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 1970 in Santa Ana, California.

/s/ Michael Mitchell

AFFIDAVIT OF JAMES DAVIS

State of California, County of Orange. No. 166675.

JAMES DAVIS declares that he is presently employed as an officer of the Santa Ana Police Department and incorporates by reference as though fully set forth herein as part of this affidavit, the attached arrest and crime report consisting of 2 pages, and declares under penalty of perjury that the facts and events therein contained were true and correct and were witnessed by him during the course of his above-mentioned employment.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 1970 in Santa Ana, California.

/s /James D. Davis

AFFIDAVIT OF GREG COOPER

State of California, County of Orange, No. 166675.

Greg Cooper declares that he is presently employed as an officer of the Santa Ana Police Department and incorporates by reference as though fully set forth herein as part of this affidavit, the attached arrest and crime report consisting of 3 pages, and declares under penalty of perjury that the facts and events therein contained were true and correct and were witnessed by him during the course of his above-mentioned employment.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 1970 in Santa Ana, California.

Greg R. Cooper, #58

Santa Ana Police Department

Sect. 23.4 misc. vehicle VC 314.1 Indecent Exposure CASE NUMBER

VC 311.6 Bottomless Dancing VC [illegible]

[illegible] evidence; additional details not given above; license and describe any property obtained, including serial numbers.

LIST CASE NUMBERS OF ANY OTHER OFFENSES CLEARED OR CONNECTED WITH THIS REPORT. USE ADDITIONAL SHEET IF NECESSARY.

EVIDENCE: 1-pair turquoise blue and black bikini panties placed in locker #5.

At 5:10pm I entered the Vampire Room Beer Bar at 4526 West 17th. Upon entering I observed six male patrons seated around a raised platform extending from the north end of the bar area there was a female subject lying on the platform, another female subject standing by the cash register behind the actual bar and two male subjects playing pool. The bar area was lit by means of ceiling lights of different colors above the platform and beer bar. Officer Cooper entered the bar approximately three minutes after I entered. I stationed myself at the extreme south end of the platform and Officer Cooper seated himself two stools to my left on the west side of the platform. This elevated platform has a shelf on all sides allowing patrons who are seated there to place their beer glasses on the shelf. The female subject

4 REPORTED AND DATE	SIGNATURE OF REPORTING OFFICER	DATE AND TIME REPORT WRITTEN	MARKET VALUE
	40. Officer Davis #4	41. 12-6-70 8:30pm	42. NIL
ARRANT ISSUED?	SIGNATURE OF SUPERVISOR APPROVING	DATE AND TIME REPORT REVIEWED	STORED BY
	44.	45.	46.

who had orriginally been on the platform stepped down shortly after our entrance and was replaced by a female subject later identified as Dinne Smith. Immediately after climbing onto the platform she sat down and began conversing with the patrons seated nearby. She was wearing a long sleeved black blouse and the bikini panties listed above. A subject in the bar played the juke-box and Miss Smith walked briefly around on the platform. After the music stopped she began making jokes with the other two female subjects concerning recent arrests that had occurred in various bars throughout the city. She then turned her back to me, bent forward and pulled her bikini panties below her buttocks clearly exposing her anil opening and vagina. She then approached Officer Cooper and repeated the same act. A few minutes later she bent forward placing her hands on the floor extending her buttocks into the air and pulled her panties down exposing her anil opening and vagina again. She repeated this act on two more occasions to Officer Cooper and to another male patron.

At 5:35pm I exited the bar and summoned Officer Collins who placed Miss Smith under arrest for SAMC 12.4, she was subsequently transported to Orange County Jail. Officer Collins obtained the panties which she was still wearing when he made contact with her and turned them over to me.

ATTENTION RECORDS: CASE CLEARED BY ARREST

Officer Davis #4/skf

CPC 311.6 Obscene Conduct

Santa Ana Police Department

CPC 314.1 Indecent Exposure

SAMC 12-4 (a) Nude Dancing CPC 314.2 Aiding & Abetting Indecent Exposure

SAMC 12-4 (b) Aiding & Abetting Nude Dancing CPC 647a Lewd Conduct

SPECIFIC OFFENSE AND CODE SECTION

CASE NUMBER 622589.

DATE AND TIME OCCURRED	LOCATION OF OCCURRENCE	DIVISION	DATE AND TIME REPORTED TO DEPT.
1. 12-7-70 9:20 AM Monday	2. 4526 W. Westminster	3. Admin. Vice	4. 12-7-70 9:25??
VICTIM'S NAME (First Name if Business)	RESIDENCE ADDRESS (Business Address if Firm)	RESIDENCE PHONE	BUSINESS PHONE AND ADDRESS
5. State of Calif., People of	6. SAPD	7. ------	8. 834-4211
PERSON REPORTING OFFENSE	RESIDENCE ADDRESS	RESIDENCE PHONE	BUSINESS PHONE AND ADDRESS
9. Sergeant Williams #17	10. SAPD	11. ------	12. 834-4211
PERSON WHO DISCOVERED CRIME	RESIDENCE ADDRESS	RESIDENCE PHONE	BUSINESS PHONE AND ADDRESS
13. Same	14. Same	15. Same	16. Same
WITNESS(ES): NAME	RESIDENCE ADDRESS	RESIDENCE PHONE	BUSINESS PHONE AND ADDRESS
17. Sergeant Williams #17 Sergeant Mitchell #8	18. SAPD SAPD	19. ---- ----	20. 834-4211 834-4211

VICTIM'S OCCUPATION	Race	Sex	Age	TYPE OF PREMISES OR LOCATION WHERE OFFENSE WAS COMMITTED
21. -----	22. ----			23. One story stucco bar, open to public

CRIMES AGAINST PROPERTY

POINT WHERE ENTRANCE WAS MADE:

24.

EXACT LOCATION OF PROPERTY WHEN STOLEN

26.

INSTRUMENTS USED (Describe)

28.

METHOD USED TO GAIN ENTRANCE

30.

WHERE WERE OCCUPANTS AT TIME OF OFFENSE?

32.

APPARENT MOTIVE—TYPE OF PROPERTY TAKEN OR OBTAINED

34.

TRADEMARK OF SUSPECT(S)—ACTIONS OR CONVERSATION

35. Dances and exposes private parts.

VEHICLE USED BY SUSPECT(S)—YEAR, MAKE, BODY TYPE, COLOR, LICENSE NUMBER AND ANY OTHER IDENTIFYING MARKS

36. None

CRIMES AGAINST THE PERSON

WEAPON—FORCE OR MEANS USED:

25.

EXACT LOCATION OF VICTIM AT TIME OF OFFENSE

27.

VICTIM'S ACTIVITY AT TIME OF OFFENSE

29.

EXACT WORDS USED BY SUSPECT

31.

33.

ARRESTEES: NAME — ADDRESS USED — CHARGES — RACE — SEX — HEIGHT — WEIGHT — AGE — IDENT. NO.'s (if any)

37.

No. 1 Monette (NMN) McCall, 1600 W. Broadway #10B, Anaheim Plat. — CPC 314.1 CPC 647a CPC 311.6 and SAMC 12-4(a) — Brn/Brn — 5-6 — 135 — (23) — DOB: 7-25-47 — F/C F09-657

AKA: Coffee

No. 2 Conchita (N) Escobar, 7250 Franklin Ave., L.A. — CPC 314.2 SAMC 12-4(b) — Brn/Brn — 5-1 — 125 — (39) — DOB: 12-18-30 — F/Spa: F09-658

No. 3

DETAILS: Describe evidence; summarize details not given above; itemize and describe any property obtained, including serial numbers.

38. LIST CASE NUMBERS OF ANY OTHER OFFENSES CLEARED OR CONNECTED WITH THIS REPORT. USE ADDITIONAL SHEET IF NECESSARY.

EVIDENCE:

One dark pink G string, placed in evidence locker number five (5).

Sergeant Mitchell and I entered the VAMPIRE ROOM BAR, 4526, West Westminster, Santa Ana, ABC license type 40 number: 57380.

As we entered we observed the arrestee, MONETTE McCALL, on the runway. The runway protrudes from a raised stage on the north end of the bar

APB NUMBER AND DATE	SIGNATURE OF REPORTING OFFICER	DATE AND TIME REPORT WRITTEN	MARKET VALUE
39.	40. Sgt. Williams	41. 12-8-70	42. NIL
WARRANT ISSUED?	SIGNATURE OF SUPERVISOR APPROVING	DATE AND TIME REPORT REVIEWED	TYPED BY
43.	44.	45.	46. ES

RDPD 20

and runs from that stage approximately 20 feet towards the south end of the bar. It is about 4 feet wide and 3 feet high. This stage is covered with a red carpet and above it, are ultraviolet and red fluorescence lights. The north wall of the bar, behind the runway and stage, is covered with mirrors so that a person on the stage or runway may be observed in the mirror as well as directly while they perform. Around the runway there were approximately 19 chairs pulled up to a small shelf of approximately 8 inches wide, which runs around the exterior of the runway. Most of these chairs were occupied at the time we entered and I sat in one, on the west side of the runway.

I observed MISS ESCOBAR behind the bar dispensing beer and operating the cash register.

MISS McCALL was lying on the carpet and I noted that she had manipulated her G string in such a manner that it was pulled inside both the labia majora and the labia minora. Her pubic area was clearly visible and appeared to have been shaved. As she lie on the runway, music was playing, however she did not appear to be moving in time with the music, nor paying any particular attention to it.

As I observed, she took a position so that her legs were pointed in my direction and she then began to knead her breasts with her hands, inverting the nipples with her index finger, etc.

She then lied back on the carpeting and spread her legs and reached down with her hands and pulled her vulva open. I was able to clearly see anal aperture as well as the vaginal opening clitoris etc.

She then moved across the stage and appeared to repeat the same motion in front of other customers.

At this time I was approached by a barmaid, who was not identified, and purchased a bottle of beer for 95¢ cents.

MISS McCALL continued to move about the stage from customer to customer to repeat the performance, as she did in front of me. At no time did she appear to pay any attention to the music until it came to a complete stop and then she would remain in front of the customer that she was adjacent to at that time and talk with him while another bar employee obtained money from MISS ESCOBAR and placed it in the juke box.

MISS McCALL then stood up and danced to one record and at the close of it, bent over, with her back towards me, reached back and spread her buttocks and with the middle finger of her right hand, pushed her G string

into her anal aperture, she then pulled it out and again laid down on the stage and began moving as she had before. During this time she pulled her G string away from her body, completely revealing her pubic area, and I noticed that MISS ESCOBAR was behind the bar at this time and appeared to be looking directly at MISS McCALL, as she continued her performance.

At this time a signal was given to Officers Sterner and Holton, who were outside, and they entered and made the arrests of both MISS McCALL and MISS ESCOBAR.

The above evidence was collected by Officer Holton and placed in locker five (5).

ATTENTION RECORDS: CASE CLEARED BY ARREST

Sergeant Williams/ss

Court of Appeal—State of California, Fourth Appellate Division, Division Two:

Conchita Escobar vs. Superior Court etc., County of Orange, et al. 4 Civ. No. 11667. (Orange County #166675).

Filed: August 17, 1971.

BY THE COURT:

The Petition for Writ of Habeas Corpus and/or Writ of Certiorari is DENIED.

Dated August 17, 1971.

Gabbert J., *Acting P.J.*

Copy to:

County Clerk County of Orange, Courthouse, Santa Ana, 92701

Attny. Genl., San Diego, 92101

Distr. Attny., Courthouse, Santa Ana, 92701

James A. Musick, Sheriff, 550 N. Flower, Santa Ana, 92701

Berrien E. Moore, 1515 Redondo Beach Blvd., Gardena, 90247

APPENDIX D.

CLERK'S OFFICE SUPREME COURT
4250 State Building
San Francisco, California 94102. Sept. 22, 1971.

Dear Sir: *I have this day filed Order*

HEARING DENIED.

In re: 4 Civ. *No.* 11667

Escobar vs. Superior Court, Orange County

Respectfully,

G. E. Bishel, *Clerk.*

IN THE

Supreme Court of the United States

October Term 1971

No. 71-641

CONCHITA ESCOBAR,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Answer to Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Orange.

CECIL HICKS,
District Attorney, County of Orange, State of California,

MICHAEL R. CAPIZZI,
Assistant District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,

700 Civic Center Drive West,
Santa Ana, Calif. 92701,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles, Phone 724-6622

SUBJECT INDEX

	Page
Statement of the Case	1
Order	4
Questions Presented	6
Argument	7
I.	
Federal Courts Have No Jurisdiction Over Error in Rulings Upon Matters in Abatement	7
II.	
A Petitioner Who Has Stipulated to a Judgment of Injunction as Part of a Bargain Cannot Attack the Validity of the Stipulated Order	7
III.	
The California "Red Light Abatement Act" Is Not Unconstitutional on Its Face	12
IV.	
The Red Light Abatement Act as Applied Through the Order of Injunction to the Conduct Involved Herein Does Not Violate Any of Petitioner's Rights	15
(A) The Order Is Aimed at Action, Not at Speech	15
(B) Statutory Prohibitions Against Nudity in Public Places Have Been Found to Be Constitutionally Within the Power of the State	20
Attachment A. A Stipulation for Entry of Decree of Permanent Injunction; Order Thereon	1
Order	3
Attachment B. Order on Stipulation	4

TABLE OF AUTHORITIES CITED

Cases — Page

A Book v. Attorney General, 383 U.S. 413, 16 L. Ed.2d 1 14

Associated Lbr, etc. Co. v. Superior Court, 79 Cal. App.2d 577 10

Atchison, T. & S.F. Ry. Co. v. Hildebrand, 238 Cal.App.2d 859 7

Bliss, Estate of, 199 Cal.App.2d 630 7

Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335 18

City of Portland v. Derrington, 451 P.2d 111 20

Cox v. State of Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 ..... 18, 19

Evans Theater Corporation v. Slaton, 180 S.E.2d 712, cert. den., 92 S.Ct. 281 ..... 12, 22

Feiner v. New York, 340 U.S. 315 15

Giannini, In Re, 69 Cal.2d 563 16

Gibony v. Empire Storage Co., 336 U.S. 490 18

Grove Press, Inc. v. Flask, 326 F. Supp. 574 13

Gunzburg v. United States, 383 U.S. 463, 16 L. Ed.2d 31 14

Halliman, In Re, 126 Cal.App. 121 10

Hoffman v. Carson, 250 So.2d 891 22

Kovacs v. Cooper, 336 U.S. 77 15

Martin v. City of Struders, 319 U.S. 141 20

Mishkin v. New York, 383 U.S. 503, 16 L.Ed.2d 56 14

People v. Glassey, unre., Crim. A 2256 (Cert. den. 332 U.S. 790, 68 S.Ct. 99, 92 L.Ed. 372, Oct. 20, 1947) 21

Page

People v. Hawley, 207 Cal. 391 8

Railway Express Agency v. New York, 336 U.S. 106 15

Roth v. United States, 354 U.S. 476 20

Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 18

State v. Brown, 165 Ohio St. 31, 59 Ohio Cps. 45, 133 N.E.2d 333, app. dis. 352 U.S. 884, 77 St.Ct. 126, 1 L.Ed.2d 21

Street v. New York, 89 S.Ct. 1354 18

Tinker v. Des Moines Independent Community School District, 89 S.Ct. 733 17

United States v. Mussellshell State Bank, 60 F.2d 157 22

United States v. O'Brien, 391 U.S. 367 .....16, 17, 19

Walker v. Birmingham, 388 U.S. 307, 18 L.Ed.2d 1210 11

Statutes

California Evidence Code, Sec. 623 9

California Penal Code, Secs. 11225-11230 1

Ohio Revised Code, Sec. 3767.01-11 14

Ohio Revised Code, Sec. 3767.01-3767.11 13

United States Code, Title 28, Sec. 2105 7

United States Constitution, First Amendment 6, 15, 16, 17, 19, 20

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-641

CONCHITA ESCOBAR,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Answer to Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Orange.

Statement of the Case.

California Penal Code Sections 11225-11230 otherwise known as the Red Light Abatement Act provide for the abatement as nuisances of places where acts of "lewdness, assignation, or prostitution" are held to occur. The statutes upon the finding that a nuisance does exist provide for the granting of preliminary injunction, final injunction and for the closing of the premises for one year.

On or about May 2, 1969, pursuant to California Penal Code Sections 11225-11230, a complaint seeking a preliminary injunction and abatement of the nuisance was filed in the Superior Court of Orange County, California, in a case entitled "*The People of the State of California vs. the 'Vampire Room'*," Conchita Escobar, *et al.*, No. 16675. The motion for

preliminary injunctive relief was heard on affidavits, which showed that during early 1969 while Conchita Escobar was owner and manager of the beer bar known as the "Vampire Room", and that the bar has a small stage set at eye level with the patrons which is and was in effect an extension of the area on which patrons placed their beer glasses. The affidavits also show that during the period of several months naked dancers had been performing simulated acts of intercourse within two feet (and sometimes inches) of the patrons' faces. On several occasions the so-called dancers had gone much further. For example, Affiant Taylor reported that on April 3, 1969, the dancer:

> With her legs spread wide apart, she moved her pubic area to within a foot of Anderson's face. We then observed Anderson rise slightly out of his seat and move his head in between Kyseck's legs. She moved slightly away from him, but then, almost immediately, moved back towards him. Anderson then moved his face back between her spread legs, and we observed him place his mouth on the bikini pants directly over Kyseck's pubic area. They maintained this position for two or three seconds before Anderson sat back in his seat and Kyseck moved away. She then moved four seats north of Anderson's location, and went into the same position in front of Terry Royce Parker. Parker was observed to place his head between Kyseck's legs and make contact between his mouth and Kyseck's pantie-covered pubic area. This contact was maintained for approximately three or four seconds.

Affiant, Mrs. Roe reported that on April 2, 1969, the dancer went into a position "where she bent over

backwards and held herself a few inches off the floor with her hands and legs. . . . She spread her legs . . . one of the customers leaned forward and placed his head between the dancer's thighs and the dancer then closed her legs on his head and held him in that position" moving her hips in an undulating manner.

Affiant Griffeth reported that on March 25, 1969, the dancer:

> . . . with legs spread apart, lowered her body and extended her pubic area while gesturing for Jackson to move forward. At this time Jackson rose from his seat and with both hands extended for body support against the bar fixture, moved his face to direct contact with the pelvic area of Moore. He was observed to hold his head in an almost motionless state while Moore gyrated her body causing contact between the facial area of Jackson and the pubic and inner-thigh area of Moore.

Affiant Gier stated that on April 24, 1969, he observed the naked dancer to hold a beer glass between her breasts and patrons to drop money in it.

The above incidents are merely samples of a rather numerous variety of lewd acts shown by the affidavits to have been committed over a period of two months. After hearing, the Superior Court of Orange County issued the preliminary injunction requested by the People. Before the case went to trial, however, Conchita Escobar, advised and accompanied by her attorney, sought to avoid trial on the merits and entered into a stipulation, prepared by her attorney of record, in which on behalf of herself and of the "Vampire Room" of which she was the licensee, she agreed to

have the preliminary injunction become permanent on condition that the People would dismiss that part of the complaint requesting closure of the premises pursuant to the Red Light Abatement Act (See Respondent's Attachment A). The stipulation was prepared by Petitioner's Counsel (See Respondent's Attachment A) and the Order of the Court (See Respondent's Attachment B), also prepared by Petitioner's counsel, signed on June 27, 1969, and entered on June 30, 1969, reads as follows:

Order.

GOOD CAUSE APPEARING THEREFORE:

IT IS HEREBY ORDERED that CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, are permanently enjoined and restrained from conducting or permitted to be conducted therein as part of the business operations the so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia, anus and pubic hair region, whether real or simulated, are not completely covered by material which cannot be seen through by the nearest spectator.

IT IS FURTHER ORDERED that all managers and operators of the above establishment are enjoined and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity.

DATED: 6-27, 1969

(SGD.) CLAUDE M. OWEN
JUDGE OF THE SUPERIOR COURT

On December 18, 1970, a "Declaration of Contempt for Violation of Permanent Injunction" was brought by the People of the State of California against Conchita Escobar in that on December 7, 1970, with full knowledge of the Order, while in full control of the Vampire Room Bar and able to comply with the Order since she was present at the exhibition, she allowed Monette McCall to do the following acts:

> Miss McCall was lying on the carpet and I noted that she had manipulated her G string in such a manner that it was pulled inside both the labia majora and the labia minora. Her pubic area was clearly visible and appeared to have been shaved. As she lie on the runway, music was playing, however she did not appear to be moving in time with the music, nor paying any particular attention to it.
>
> As I observed, she took a position so that her legs were pointed in my direction and she then began to knead her breasts with her hands, inverting the nipples with her index finger, etc. She then lied back on the carpeting and spread her legs and reached down with her hands and pulled her vulva open. I was able to clearly see anal aperture as well as the vaginal opening, clitoris, etc.
>
> She then moved across the stage and appeared to repeat the same motion in front of other customers.

The Superior Court of Orange County after due hearing found Conchita Escobar guilty of contempt.

Questions Presented.

I. *Whether the Federal Courts have jurisdiction to review state actions abating a nuisance.*

II. *Whether a petitioner who has stipulated to a judgment of injunction can attack its validity.*

III. *Whether the California "Red Light Abatement Act" upon which the order of injunction rests is unconstitutional as applied because in violation of Petitioner's First Amendment rights.*

IV. *Whether the order of injunction is unconstitutionally broad.*

ARGUMENT.

I.

Federal Courts Have No Jurisdiction Over Error in Rulings Upon Matters in Abatement.

Respondent submits that the jurisdiction of This Honorable Court in this case is limited by 28 U.S.C. §2105 which states:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

II.

A Petitioner Who Has Stipulated to a Judgment of Injunction as Part of a Bargain Cannot Attack the Validity of the Stipulated Order.

Whether in a civil suit or in a criminal proceeding, California law has always respected a bargain made by the parties and cases have held that a party to the bargain cannot later complain because of its existence. Thus in *Estate of Bliss*, 199 Cal.App.2d 630, 641, the California Court states:

> Further, defendant is not in a position to complain of the consolidation because a written stipulation (executed on behalf of plaintiffs and defendant) that the equity action and the contest "be consolidated for the purpose of trial only" was filed in both causes and the order was made pursuant thereto.

In *Atchison, T. & S.F. Ry. Co. v. Hildebrand*, 238 Cal.App.2d 859, as in the case at hand, appellants had entered into a stipulation permitting the court to enter a Consent decree for an injunction against them.

After judgment was so entered, the appeal followed. In dismissing the appeal the Court stated:

> It is, of course, an elementary rule of appellate procedure that a judgment or order will not be disturbed on an appeal prosecuted by a party who consented to it. (*Adams v. Southern Pacific Co.*, 109 Cal.App. 728, 731 [293 P. 681], [citations].) A stipulation such as the one at bench is a consent within the meaning of this rule. (*Brooms v. Brooms, supra,* at p. 352.)

Moreover, from a practical standpoint the determination of validity of the California statute as applied, sought by Petitioner would be impossible. The action brought was, in fact, an action in abatement. The scope of the Order of the Court thus can only be evaluated in terms of whether it is germane to the abatement of the nuisance complained of and in light of the evidence showing the existence and the type of nuisance involved. As stated in *People v. Hawley,* 207 Cal. 391, 400:

> . . . appellants contend that the sole power given by the court in such an action is to abate a public nuisance, and that it confers no power upon the court to issue an injunction. It is true that this section of the code refers only to an action brought "to abate a public nuisance," but it is often, and we might say generally, necessary in order to abate a nuisance to direct that those guilty of maintaining the same be enjoined from doing certain acts, which, if done, would amount to a continuance or maintenance of such nuisance.

That Court went on to conclude:

> . . . We are satisfied that the court in said action had the power to issue an injunction restraining the defendants from the commission of any act or acts which the evidence showed *would contribute to* or result in the maintenance or creation of the nuisance complained of.

The test of validity, therefore, is not in terms of whether the acts enjoined are, or are not constitutionally legal, but rather it is whether they are designed to *prevent* the continued existence or reoccurrence of the nuisance complained of.

Where as in the case at hand a consent judgment of injunction is entered without hearing, there is no factual evidence of what the nuisance consisted of and thus no facts from which to test the validity of the terms of the injunction.

Moreover, in the case under submission the Petitioner, in consideration of Respondent's dismissal of part of the prayer for relief, stipulated that the People should be awarded a permanent injunction to abate the nuisance described in the complaint. In so doing, it is submitted, Petitioner agreed that the permanent injunction was suitable, proper, *and* necessary to abate the nuisance and he is now precluded from contradicting himself by California Evidence Code §623 which states:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

In accord with the above principles the Court in *In re Halliman,* 126 Cal.App. 121, 127, went on to say:

> . . . it is held generally that a stipulation made in open court as this one was "constitutes not only an agreement between them and the court, which the latter is bound to enforce . . ." (23 Cal. Jur. 811); and even though a party after entering into a stipulation is allowed under certain circumstances to withdraw therefrom, it does not appear that petitioner ever asked permission so to do. Therefore, so far as the record before us shows, the trial court did not exceed its jurisdiction in seeking to enforce as against petitioner the stipulation theretofore made by him.

In the case at hand, the Petitioner admitted that a nuisance existed under the Red Light Abatement Act and *agreed* not to do certain things which *he agreed* would contribute to the nuisance. Those facts must, therefore, be taken as true and even though the prohibited conduct were as legal as digging in one's own backyard, the Court has the jurisdiction and the power to enforce the permanent injunction to which Petitioner has stipulated. Moreover, *Associated Lbr. etc. Co. v. Superior Court,* 79 Cal.App.2d 577, clearly shows that, once an order of injunction is final and no appeal is pending, under California law the sole issue before the reviewing Court is to ascertain whether the trial court acted within its jurisdiction in rendering judgment in the contempt proceeding. It is there stated:

> On certiorari a reviewing court may not weigh the evidence upon which the petitioner has been

> found by a trial court to be guilty of contempt, except for the purpose of determining jurisdiction. Its sole province is to determine from the record whether the trial court acted within its jurisdiction in rendering judgment in the contempt proceeding.

What is before this Honorable Court, therefore, is the contemptous disregard of an order made by a court having both jurisdiction over the parties and over the subject matter and clearly valid and enforceable under California Law. This Court in *Walker v. Birmingham*, 388 U.S. 307, 18 L.Ed.2d 1210, 1216, has stated:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." 258 U.S., at 189-190, 66 L.Ed. at 559.

Here as in that case no efforts were made to have the order modified or vacated, and here as in that case Petitioner has failed to show a right to relief by This Honorable Court.

III.

The California "Red Light Abatement Act" Is Not Unconstitutional on Its Face.

Several states have declared a place where lewd acts are committed to be a nuisance and have allowed the abatement of such places. For example, in *Evans Theater Corporation v. Slaton*, 180 S.E.2d 712, 715, *cert. den.*, 92 S.Ct. 281, the Georgia Supreme Court upheld the use of a nuisance statute to enjoin the showing of allegedly lewd movies. That Court points out:

> The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.

That Court emphatically concluded:

> . . . it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance

> of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws.

Similarly, in *Grove Press, Inc., v. Flask*, 326 F. Supp. 574 the Court considered a statutory scheme for the abatement of nuisances and found the statutes to be constitutional both on their faces and as applied. The Federal District Court there goes on to say:

> The primary contention of plaintiffs is that the Ohio nuisance laws are unconstitutional on their face and as applied to the regulation of obscene matter. Ohio Revised Code §§ 3767.01-3767.11.
>
> The Ohio Revised Code establishes a statutory scheme for the regulation of nuisances, including places in which lewd or obscene films are exhibited. It provides for temporary injunctive relief upon application and after a hearing within ten days after filing of a suit. It also permits a judge to "issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place. * * *" And if the material is found to be obscene after a trial, a permanent injunction may issue. Further, certain penal provisions may apply: including, the levying of special taxes and liens; the voiding of leases; and the closing of places where nuisances are committed for up to one year, subject to cer-

tain ameliorating or modifying provisions including the "good faith" of the owner of the place. O.R.C. § 3767.01-11.

That Court concludes:

> We must assume "that state courts and prosecutors will observe constitutional limitations as expounded by [the United States Supreme] Court" . . . .
>
> While a nuisance statute is admittedly an imprecise tool with which to administer the regulation of obscenity, the definition of "lewd, indecent, lascivious or obscene films", contained within the statute does not, in the words of *Roth*, "offend the constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." 354 U.S. at 492, 77 S.Ct. at 1313. The Ohio statutes are not overly broad.

The arguments made by the above cases are particularly appropriate where as here, the "lewdness" consists of conduct which is at best symbolic speech. Additionally it is submitted that application of the nuisance statutes is particularly suited to the furtherance of the "pandering" and "selective suppression of obscenity" concepts which form the basis for this Court's decisions in *A Book v. Attorney General*, 383 U.S. 413, 16 L.Ed.2d 1; *Ginzburg v. United States*, 383 U.S. 463, 16 L.Ed.2d 31 and *Mishkin v. New York*, 383 U.S. 503, 16 L.Ed.2d 56, since the "Abatement" does not suppress the material *per se* but only prohibits it within a specific set of factual circumstances.

IV.

The Red Light Abatement Act as Applied Through the Order of Injunction to the Conduct Involved Herein Does Not Violate Any of Petitioner's Rights.

(A) The Order Is Aimed at Action, Not at Speech.

The Order in question is not aimed at what is said but at what is done. It thus aims at regulation—not at suppression.

The power of the state to regulate conduct, even in the important area of free speech, has never been questioned. For example, advertising is a mode of expression, but *Railway Express Agency v. New York*, 336 U.S. 106 (1949), approved of an ordinance limiting advertising on public conveyances. The right to assemble is also a First Amendment right, but *Feiner v. New York*, 340 U.S. 315, shows that the right cannot be freely indulged into in *all* places. The right to freely express and advocate opinion or ideas is at the very core of the First Amendment, but *Kovacs v. Cooper*, 336 U.S. 77, clearly shows that the state may regulate by prohibiting the use of sound trucks.

In light of constitutional history, the regulatory power of the state is unquestionable as it is unquestionable that certain forms of expression (to wit: political and religious) stand higher in the scale of importance than do others (advertising or dancing, for example). Reading of the Order shows that what is here prohibited is the nakedness of certain parts of the anatomy in a particular place. Petitioner's hue and cry is that "Nudity *per se* is protected by the First Amendment."

Respondent submits that nudity *per se* is not protected by the First Amendment and becomes protected

only when it is an "expression" of some idea, *i.e.*, when it becomes an act of *symbolic* speech. *In Re Giannini*, 69 Cal.2d 563, did not say, as has been contended, that *nudity* is a form of expression but that the *dance* is a form of expression and that nudity integral to it could not be suppressed when it is *integral* to it.

To elucidate further: A photograph depicting a dog is a form of expression and is protected, as are photographs depicting pigs, jackals, or the naked female. But does it follow that *the* depicted dog, pigs, jackals, and naked females are protected by the First Amendment? A naked marble statute is a form of expression, but is the marble protected before the work begins? Clearly not. Nudity, therefore, is *not per se* cloaked with First Amendment protection and is only entitled to protection when it is found in the context of a performance.

Even assuming the conduct here involved to be within the scope of a performance, the prohibition of the Order goes not to the performance itself but to the element of "nakedness" contained within the performance. But "nakedness" must be classed as "symbolic speech," not as speech proper, and in recent years This Honorable Court has set a different test for the protection of "symbolic speech" than it has for speech proper. *United States v. O'Brien*, 391 U.S. 367, 377, sets forth the test. There This Honorable Court refused to strike down a statute which prohibited the burning of draft cards, and stated:

> O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amend-

ment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft. . . ."

We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea. This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. . . . We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

In applying the concepts set forth in *O'Brien*. The Court has upheld conduct which was *per se* innocuous while condemning conduct conducive to disruption.

Thus, for example, while declaring that the wearing of armbands by students was "symbolic free speech" within the protection of the First Amendment (see *Tinker v. Des Moines Independent Community School District*, 89 S.Ct. 733). this same Court did not hesitate to allow regulation of similar conduct under cir-

cumstances where the conduct might be conducive to disruption (*Cf. e.g. Cox v. Louisiana*, 379 U.S. 536, 555).

Moreover, it rarely has been suggested that constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute (*Cf. Gibony v. Empire Storage Co.*, 336 U.S. 490; and *Street v. New York*, 89 S.Ct. 1354, where the court distinguishes between the "symbolic act" of burning a flag and spoken words).

In another field involving far more important First Amendment rights than the one now under consideration, the Supreme Court, in differentiating between absolute prohibition and *regulation* of conduct in *Cameron v. Johnson*, 390 U.S. 611, 617, 88 S.Ct. 1335, 1338, 1339, has stated:

> The argument centers on the fact that the proscription of the statute embraces picketing employed as a vehicle for constitutionally protected protest. But "picketing and parading [are] subject to regulation even though intertwined with expression and association," *Cox v. State of Louisiana*, 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487, and this statute does not prohibit picketing so intertwined unless engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse. Prohibition of conduct which has this effect . . . does not abridge constitutional liberty "since such activity bears no necessary relationship to the freedom to * * * distribute information or opinion." *Schneider v. State*, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155. The statute is therefore

> "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society * * * the fact that free speech is intermingled with such conduct does not bring it within constitutional protection." *Cox v. State of Louisiana, supra,* 379 U.S. at 564, 85 S.Ct. at 481.

It is thus clear from the above that *conduct, i.e.,* symbolic speech can be *controlled* even if it cannot be suppressed. Accordingly, an Order controlling a nuisance by controlling such conduct does not run afoul of the First Amendment prohibition.

Where, as here, the element of "nakedness" does not seriously hinder the market place of ideas, the Order cannot be struck down. And Respondent submits that the performer is not less of a performer because of lack of adequate clothing on her body. Nor is nudity a necessary attribute of the form of expression called go-go dancing. It is thus a separate adjective that can be separately prohibited without running afoul of the First Amendment.

> And since such activity bears no necessary relationship to the freedom to distribute information or opinion, (its) prohibition does not abridge constitutional liberty, *Schneider v. State,* 308 U.S. 147; *Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335.

As *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, states:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea.

Additionally, Respondent submits that not only is protection of nudity not proper First Amendment protection, but also that the prohibition of nude appearances does not in any way "contract the spectrum of knowledge" (see *Martin v. City of Struders*, 319 U.S. 141) so as to *require* First Amendment protection. As Justice Douglas has said:

> No one would suggest that the first amendment permits nudity in public places. *Roth v. United States*, 354 U.S. 476, 512.

Accordingly, Respondent submits that an Order merely regulating such conduct cannot be considered unconstitutional on its face.

(B) Statutory Prohibitions Against Nudity in Public Places Have Been Found to Be Constitutionally Within the Power of the State.

In the recent case of *City of Portland v. Derrington*, (Oregon) (1968) 451 P.2d 111, *cert. den.* November 17, 1969, the issue involved a city ordinance proscribing the exhibition of one or both female breasts in any place where food or alcoholic beverage was offered for consumption on the premises by the public.

That Court in upholding the validity of the ordinance pointed out:

> Once a court concludes that the performance and costumes of female attendants in bars and taverns can be regulated only within the First Amendment limits upon the powers of the government to regulate speech, there is no limit but obscenity, whatever that is. *City of Portland v. Derrington, supra.* Neither the state nor the United States Constitution requires such a construction

that would limit the legislative function of city government to this extent. In cases of this nature, the court must look to the substance of the regulation and ask whether the elements of communication which may be present in the regulated conduct are significant enough to bring the entire course of conduct under the protective mantle of the First Amendment. *Schneider v. State*, 308 U.S. 147; 60 S.Ct. 146.

When nudity is employed as a sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours. . . .

The question is not one of legislative wisdom but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar has enough substance to present a First Amendment question.

Similarly in *State v. Brown*, 165 Ohio St. 31, 59 Ohio Cps. 45, 133 N.E.2d 333 at 335 (appeal dismissed 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed.2d ..... the Court held valid a statute prohibiting nudist camps.

In *People v. Glassey*, unreported, Crim. A 2256 (*Cert. den.* 332 U.S. 790, 68 S.Ct. 99, 92 L.Ed. 372, Oct. 20, 1947), the Appellate Department of the Su-

perior Court of the County of Los Angeles held valid as against objections similar to those of the Petitioner, an ordinance of the City of Los Angeles prohibiting conducting any camp where three or more persons not all of the same sex are permitted or allowed to commingle in the nude.

Pertinent to the denial of certiorari in the above cases and in *Evans Theater, supra*, is the statement in *United States v. Musselshell State Bank*, 60 F.2d 157 at 159:

> While the denial of a writ of certiorari, imports no expression of opinion upon the merits, it is a circumstance that may well have thoughtful consideration, in connection with other related questions.

Finally, Respondent submits that this case parallels that of *Hoffman v. Carson*, 250 So.2d 891 appeal dismissed by This Honorable Court on December 7, 1971, "for lack of a federal question." In that case the Florida Court considered and found constitutionally valid the application of an indecent exposure statute to a naked beer bar dancer. In rejecting the defendant's claim of constitutional invalidity that court aptly stated:

> Appellant loses sight of the distinction between speech and conduct. The statute is not directed at First Amendment rights of free expression, nor does it concern itself with obscenity as does Fla. Stat. Chapter 847, F.S.A. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law [*e. g. Commonwealth v. Broadland*, 315 Mass. 20, 51 N.E.2d 961 (1943); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241

(1952)], and generally considered as having a reasonable relationship to the public welfare; and, therefore, within the police power of the Legislature.

Accordingly, and for all the above reasons, Respondent respectfully urges This Honorable Court to deny the Petition for Certiorari.

Dated this 17th day of February, 1972.

Respectfully submitted,

CECIL HICKS,
District Attorney, County of Orange,
State of California,

MICHAEL R. CAPIZZI,
Assistant District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,

Attorneys for Respondent.

ATTACHMENT A.

A Stipulation for Entry of Decree of Permanent Injunction; Order Thereon.

Kent G. Snyder
Attorney at Law
1010 North Main Street, Suite 515
Santa Ana, California 92701
(714) 547-7408
Attorney for Defendant

Superior Court of the State of California, for the County of Orange.

The People of the State of California, Plaintiff, vs. Vampire Room, Conchita Escobar, et al. Defendants. No. 166 675.

IT IS HEREBY STIPULATED AND AGREED by and between the people of the State of California, plaintiff, in the above entitled action, and by CONCHITA ESCOBAR, dba THE VAMPIRE ROOM, defendant in the above entitled action, by and through their respective attorneys, that the people of the State of California shall be awarded a permanent injunction to abate the nuisance described in the complaint on file herein.

IT IS FURTHER STIPULATED AND AGREED between the above named parties that an Order may be entered against CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, enjoining and restraining them from conducting or permitted to be conducted within said establishment as a part of the business operations so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and

exhibitions where the performer's genitalia and anus and pubic hair region whether real or simulated are not completely covered by a material which cannot be seen through by the nearest spectator.

IT IS FURTHER STIPULATED AND AGREED that all managers and operators of the above establishment are enjoined and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity.

IT IS FURTHER STIPULATED AND AGREED that except as hereinabove stipulated all other relief prayed for by the complaint is hereby dismissed by the plaintiff.

DATED: June 27, 1969

/s/ Michael R. Capizzi, Deputy
CECIL HICKS, District Attorney of the County of Orange, State of California.
Attorney for Plaintiff

APPROVED:

/s/ Conchita Escobar
CONCHITA ESCOBAR

/s/ Kent G. Snyder,
KENT G. SNYDER, Attorney for Defendant, Conchita Escobar, dba The Vampire Room

Order.

GOOD CAUSE APPEARING THEREFORE:

IT IS HEREBY ORDERED that CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, are permanently enjoined and restrained from conducting or permitted to be conducted therein as a part of the business operations the so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia, anus and pubic hair region whether real or simulated are not completely covered by material which cannot be seen through by the nearest spectator.

IT IS FURTHER ORDERED that all managers and operators of the above establishment are enjoined and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity.

DATED: 6-27, 1969

CLAUDE M. OWENS
JUDGE OF THE SUPERIOR COURT

ATTACHMENT B.

Order on Stipulation.

Kent G. Snyder
Attorney at Law
1010 North Main Street, Suite 515
Santa Ana, California 92701
(714) 547-7408
Attorney for Defendant

Superior Court of the State of California, for the County of Orange.

The People of the State of California, Plaintiff, vs. Vampire Room, Conchita Escobar, et al, Defendants. No. 166 675.

The above entitled matter came on for hearing at 9:00 a.m., June 27, 1969, in Department 2 of the above entitled court, the Honorable Claude M. Owens, Judge Presiding, plaintiff, the People of the State of California being represented by Deputy District Attorney Michael Capizzi, and the defendant, Conchita Escobar, being present in court and being represented by her attorney, Kent G. Snyder, and having entered into a stipulation, and the Court having considered the stipulation;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the complaint on file in the above captioned action be dismissed as to all matters as to the defendants James T. and Lorraine E. Robinson and Gordon S. and Helen J. Moen; and

2. That as to the defendant, Conchita Escobar, dba The Vampire Room, that the relief prayed for in paragraph 1 of the prayer found on page 3 of the com-

plaint from line 18 to and including line 24 and paragraph 6 of the prayer of the complaint found on page 4 thereof from line 23 to and including line 32 be dismissed as to said defendant.

Dated: 7-3-'69

CLAUDE M. OWENS
Judge of the Superior Court

APPROVED AS TO FORM
Michael R. Capizzi,
Deputy District Attorney,
County of Orange, State of California
Attorney for Plaintiff

/s/ Kent G. Snyder
Kent G. Snyder
Attorney for defendant
CONCHITA ESCOBAR